

UNITED STATES DISTRICT COURT  
Northern District of California

KRISTA O'DONOVAN, EDUARDO DE LA  
TORRE and LORI SAYSOURIVONG,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

CASHCALL, INC., a California corporation,

Defendant.

No. C 08-03174 MEJ

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS'  
MOTION FOR CLASS  
CERTIFICATION**

**[Docket No. 60]**

**I. INTRODUCTION**

Pending before the Court is Plaintiffs Krista O'Donovan, Eduardo De La Torre, and Lori Saysourivong's (collectively "Plaintiffs") Motion for Class Certification. Dkt. No. 60. After carefully considering the parties' arguments, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' Motion, as set forth below.

**II. BACKGROUND**

**A. Factual Background**

The following factual allegations are taken from Plaintiffs' Fourth Amended Class Action Complaint ("FAC"), filed on February 25, 2010. Dkt. No. 54.

Defendant CashCall is a California corporation engaged in the business of making unsecured personal loans to consumers at high interest rates. *Id.* ¶¶ 4, 17, 18.

In October 2005, Plaintiff Krista O'Donovan borrowed \$5,075 from CashCall. *Id.* ¶ 20. Pursuant to the Promissory Note and Disclosure Statement that Ms. O'Donovan executed, the loan was based on an annual percentage rate of interest ("APR") of 59.83%, with the total payments to

1 amortize the debt listed as \$30,161.86, or six times the principal. *Id.*<sup>1</sup> According to O'Donovan,  
 2 CashCall made this loan despite it being "beyond her financial ability to repay [it] in the time and  
 3 manner provided in the CashCall Promissory Note and Disclosure Statement." *Id.* ¶ 21.  
 4 Particularly, she alleges that "CashCall did not conduct any assessment of [her] employment,  
 5 earnings capacity, her job security, her monthly expenses or her outstanding debt when it approved  
 6 her for the loan." *Id.* ¶ 23. She avers that based on "the monthly expenses she was required to pay  
 7 in order to care for her family and maintain their basic living conditions, [she] could not afford her  
 8 CashCall loan payment each month." *Id.* ¶ 22.

9 In February 2006, Plaintiff Eduardo De La Torre borrowed \$2,600 from CashCall with an  
 10 APR of approximately 98%. *Id.* ¶ 24. The stated total payments required to amortize the debt was  
 11 over \$9,000. *Id.* De La Torre alleges that CashCall made this loan despite his financial inability to  
 12 repay it in the time and manner provided in the CashCall Promissory Note and Disclosure Statement.  
 13 *Id.* ¶ 25. Particularly, at the time he received the loan from CashCall, De La Torre was a college  
 14 student whose income consisted of wages earned from part-time work and student loans and his  
 15 monthly living expenses exceeded his income. *Id.* ¶¶ 25, 26. He alleges that "[p]aying CashCall  
 16 back for the loan in the time and manner required by CashCall was especially difficult because  
 17 repayment would require several years of regular payments, which was not realistic given De La  
 18 Torre's status as a student without significant earned income." *Id.* ¶ 26. De La Torre also avers that  
 19 CashCall did not conduct any assessment of his employment, earning capacity, monthly expenses, or  
 20 outstanding debt when it approved him for the loan. *Id.* ¶ 27.

21 In May 2006, Plaintiff Lori Saysourivong executed a loan for \$2,525 from CashCall at an  
 22 APR of 99.07%, according to CashCall's Promissory Note and Disclosure Statement. *Id.* ¶ 28. The  
 23 stated total payments to amortize the debt was \$9,149.51. *Id.* Saysourivong alleges that CashCall  
 24 made this loan despite her financial inability to repay it in the time and manner set forth in the  
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26 <sup>1</sup> Although the Fourth Amended Complaint refers to the Promissory Note as Exhibit A,  
 27 Plaintiffs failed to attach it as an exhibit. However, it is located in the record as Exhibit A to  
 28 Plaintiffs' Third Amended Complaint, Docket No. 38 at 22.

1 Promissory Note and Disclosure Statement. *Id.* ¶ 29. She alleges that CashCall did not conduct any  
 2 assessment of her earning capacity, her job security, her monthly expenses, or her outstanding debt  
 3 when it approved her for the loan. *Id.* ¶ 31. In particular, she alleges that at the time she took out  
 4 the loan from CashCall, she had essential monthly expenses that exceeded her guaranteed income,  
 5 including credit card debt, commuting expenses, rent, and monthly living expenses. *Id.* ¶ 29.  
 6 Additionally, Saysourivong alleges that repaying the loan according to the schedule in the  
 7 Promissory Note and Disclosure Statement was especially difficult because it required several years  
 8 of regular payments, which was not feasible because of her expenses and her husband's inconsistent  
 9 income. *Id.* ¶ 30.

10 Pursuant to California Civil Code section 1781 and Rule 23 of the Federal Rules of Civil  
 11 Procedure, Plaintiffs bring this lawsuit as a class action on behalf of themselves and all others  
 12 similarly situated as members of a proposed class. *Id.* ¶ 32. Plaintiffs define the putative class as,  
 13 "All individuals who borrowed money from CashCall, Inc., for personal, family, or household use at  
 14 any time from June 30, 2004 to the present." *Id.* On behalf of themselves and the putative class,  
 15 Plaintiffs assert claims for: (1) violation of the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. §  
 16 1693 *et seq.*, and Federal Reserve Regulation E ("Regulation E"), 12 C.F.R. § 205 *et seq.*; (2)  
 17 violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*; (3)  
 18 violation of the Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq.*; (4)  
 19 unlawful business practices in violation of California Business & Professions Code section 17200;  
 20 (5) unlawful and unfair business practices in violation of Business & Professions Code section  
 21 17200; and (6) unlawful, fraudulent, and unfair business practices in violation of Business &  
 22 Professions Code section 17200. *Id.* at 8-18.

23 With respect to Plaintiffs' first claim for violation of the EFTA and Regulation E, Plaintiffs  
 24 allege that the Promissory Note and Disclosure Statements associated with Plaintiffs' and the  
 25 putative class members' loans "uniformly specify a particular day of the month when CashCall is  
 26 allowed to initiate and affect electronic fund transfers from customer accounts to collect installment  
 27 payments and other amounts from Plaintiffs and the Plaintiff Class." *Id.* ¶ 43. They allege that  
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1 CashCall has engaged “in the business practice of initiating and effecting electronic funds transfers  
2 from customer accounts to collect payments on days of the month other than those agreed to and  
3 specified in the Promissory Note and Disclosure Statement.” *Id.* ¶ 44. Particularly, Plaintiffs allege  
4 that when CashCall fails to collect a loan installment payment or other charge through an electronic  
5 funds transfer (“EFT”) on the agreed-upon day, it thereafter attempts to collect the installment  
6 payment and other charges on later days during the same installment cycle that were not agreed to or  
7 authorized by the customer, thereby violating the EFTA, 15 U.S.C. § 1693e(a), and Regulation E.  
8 *Id.* ¶¶ 44-47.

9 Plaintiffs also allege that CashCall engages in the business practice of conditioning the  
10 extension of credit on the customer’s agreement to repayment by means of preauthorized EFTs, and  
11 requires that customers agree to a provision permitting CashCall to make electronic debits from their  
12 bank account, in violation of § 1693k(1) of the EFTA and Regulation E. *Id.* ¶ 48. Further, Plaintiffs  
13 allege that CashCall has violated EFTA § 1693e(a) and Regulation E by limiting customers’ rights  
14 to cancel or stop payment of a preauthorized EFT. *Id.* ¶¶ 50-51.

15 Plaintiffs’ second claim is for violation of California’s Consumer Legal Remedies Act, Cal.  
16 Civ. Code § 1750. *Id.* at 10-11. Plaintiffs allege that CashCall violated section 1770(a)(5) of the  
17 CLRA by representing that the services it provides have characteristics and benefits that they do not  
18 have. *Id.* ¶ 56. Plaintiffs also allege that CashCall has violated section 1770(a)(14) of the CLRA by  
19 representing that it has rights and remedies that are prohibited by law, including the right to collect  
20 debts without providing notices required by law, and that it has the right to collect debts in a manner  
21 prohibited by the EFTA and the Rosenthal Act. *Id.* ¶ 57. Further, Plaintiffs allege that CashCall has  
22 violated CLRA section 1770(a)(19) “by including unfair and unconscionable loan terms, including  
23 unconscionable usury rates and an unconscionable Internet presentation of the loans, in its loan  
24 agreements.” *Id.* ¶ 58. They allege that CashCall possesses bargaining power and strength superior  
25 to Plaintiffs and the Class Members’ and that, without discussion or negotiation, CashCall offered  
26 standardized form contracts that it drafted on a take-it-or-leave-it basis, which amount to contracts of  
27 adhesion and are therefore unlawful. *Id.*

1 Plaintiffs' third claim is for violation of California's Rosenthal Fair Debt Collection  
2 Practices Act, Cal. Civ. Code § 1788, and the federal Fair Debt Collection Practices Act, 15 U.S.C. §  
3 1692. *Id.* at 12. Plaintiffs allege that when they were late in making payments on their respective  
4 loans, CashCall employees called them multiple times during the day and aggressively demanded  
5 that they make payments on their loans, made misrepresentations, and yelled at and threatened  
6 Plaintiffs. *Id.* ¶ 68. Plaintiffs also allege that CashCall contacted third parties in an attempt to  
7 collect on Plaintiffs' debts, including family members, friends, and employers. *Id.* Plaintiffs further  
8 allege that CashCall claimed and collected amounts not authorized under the loan agreements, such  
9 as insufficient fund fees on electronic debit transactions made on unauthorized days of the month,  
10 and failed to include certain debt collection notices required by law. *Id.* ¶ 69(d), (e).

11 Plaintiffs' fourth through sixth claims are for violation of California's Unfair Competition  
12 Law ("UCL"), Cal. Bus. & Prof. Code § 17200. *Id.* at 13-18. Plaintiffs allege that CashCall  
13 engages in the illegal and unfair business practice by making loans with unconscionable terms and  
14 interest rates, by failing to accurately and fairly represent the characteristics and benefits of the  
15 loans, and by making loans without regard to the customer's ability to repay the loan. *Id.* ¶¶ 75-91.  
16 Plaintiffs also allege that CashCall's business practices in making and collecting loans are unlawful  
17 business practices in violation of the UCL because they violate the EFTA, the Rosenthal Act, and  
18 the CLRA. *Id.* ¶ 96. Finally, Plaintiffs allege that CashCall's "marketing, sale, and collection of its  
19 loans are fraught with material misrepresentations and omissions that are likely to deceive  
20 consumers," thereby violating section 17200. *Id.* ¶¶ 100-02.

## 21 **B. Procedural Background**

22 Plaintiffs filed this action against CashCall on July 1, 2008. Dkt. No. 1. On October 10,  
23 2008, Plaintiffs filed their First Amended Complaint (Dkt. No. 11), which CashCall moved to  
24 dismiss. On June 24, 2009, the Court granted CashCall's motion in part and denied it in part. Dkt.  
25 No. 34. Plaintiffs subsequently filed Second and Third Amended Complaints. Dkt. Nos. 35, 38. On  
26 February 25, 2010, Plaintiffs filed the operative Fourth Amended Complaint. Dkt. No. 54. On  
27 March 26, 2010, CashCall filed its Answer and Counterclaim for breach of contract against De la  
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1 Torre and Saysourivong. Dkt. No. 57.

2 On June 3, 2010, Plaintiffs filed the instant Motion for Class Certification (Dkt. No. 60) and  
3 supporting declarations (Dkt. Nos. 62, 63, 64, 65). On June 24, 2010, CashCall filed its Opposition  
4 (Dkt. No. 76) and supporting declarations (Dkt. Nos. 77-84), to which Plaintiffs filed their Reply  
5 (Dkt. No. 87). On September 2, 2010, the Court held a hearing on the Motion and took the matter  
6 under submission. Having carefully considered the parties' arguments and thoroughly reviewed  
7 their supporting documents and cited authorities, the Court now rules as follows.

### 8 III. DISCUSSION

#### 9 A. Proposed Classes

10 Plaintiffs move to certify the following National Class for claims based on the EFTA,  
11 Rosenthal Act, and UCL claims (the "proposed National Class"):

12 All individuals who borrowed money from CashCall, Inc. for personal,  
13 family, or household use (a) from whose bank accounts CashCall withdrew or  
14 attempted to withdraw monthly loan installment payments on multiple days of the  
15 same month; or (b) who received a collection communication from CashCall stating  
16 that payment had to be made using money order, MoneyGram, or other certified  
17 funds; or (c) was late in making a payment and was telephoned by CashCall during  
18 the first 59 days of delinquency in connection with the late payment, or (d) who  
19 signed CashCall's promissory note containing the electronic funds authorization, at  
20 any time from June 30, 2004 to the present.

21 Mot. at 4. Plaintiffs contend that this Class is nationwide in scope because the EFTA claims are  
22 federal and apply nationally, and because the Rosenthal Act and related unlawful UCL claims apply  
23 generally to CashCall because its conduct giving rise to the members' injuries that occurred in  
24 California, where it is incorporated and headquartered. *Id.*

25 Plaintiffs also move to certify the following class of California borrowers for UCL claims  
26 based on CashCall's alleged practice of extending loans with unfair terms and its violations of  
27 California's Finance Lenders Law (the "proposed California Class"):

28 All individuals who, while residing in California, borrowed from \$2,500 to \$2,600 at  
interest rate of 90% or higher from CashCall, Inc., for personal, family, or household  
use at any time from June 30, 2004 to the present.

*Id.* at 5.

**B. Legal Standard**

“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” *Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, 131 S. Ct. 2541, 2550 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). Federal Rule of Civil Procedure 23 (“Rule”) provides the rubric for assessing whether a particular lawsuit may be certified as a class action. Toward this end, the party seeking class certification bears the burden of establishing that the requirements of Rule 23(a) and (b) are satisfied. *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th Cir. 2010).

First, under Rule 23(a), the party seeking certification must demonstrate that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. Pro. 23(a)(1)-(4). As the Supreme Court explained in *Dukes*:

Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule’s four requirements—numerosity, commonality, typicality, and adequate representation—effectively limit the class claims to those fairly encompassed by the named plaintiff’s claims.

*Dukes*, 131 S. Ct. at 2550 (internal quotations and citation omitted).

If the party successfully establishes each of the elements under Rule 23(a), it must then demonstrate that the proposed class satisfies at least one of the three requirements listed in Rule 23(b). *Id.* at 2548. Here, Plaintiffs rely on Rule 23(b)(3), which provides that a class may be maintained where “questions of law or fact common to class members predominate over any questions affecting only individual members,” and a class action would be “superior to other available methods for fairly and efficiently adjudicating the controversy.”

“In determining the propriety of a class action, the question is not whether the plaintiffs have stated a cause of action or will prevail on the merits, but, rather, whether the requirements of Rule 23 are met.” *Pablo v. ServiceMaster Global Holdings, Inc.*, 2009 WL 2524478, at \*4 (N.D. Cal. Aug.



17, 2009) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003)). The district court is therefore obligated to conduct a “rigorous analysis” into the applicable Rule 23 factors before certifying a class action. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). The Supreme Court has recognized that “the class determination generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.’” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat’l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). Nevertheless, “[a]lthough some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits at the class certification stage.” *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (citation omitted). “Rather, the court’s review of the merits should be limited to those aspects relevant to making the certification decision on an informed basis.” *Aho v. AmeriCredit Fin. Servs., Inc.*, 2011 WL 3047677, at \*3 (S.D. Cal. July 25, 2011) (citing Fed. R. Civ. P. 23 advisory committee notes). If, after undertaking such a review, the court is not satisfied that the moving party has sufficiently demonstrated the requirements of Rule 23(a) and (b) are satisfied, certification should be denied. *Falcon*, 457 U.S. at 161. The Court therefore turns to the Rule 23 factors.

### 17 C. Rule 23(a) Factors

#### 18 1. Whether the Action is Maintainable Under Rule 23(a)

##### 19 a. *Numerosity*

20 Rule 23(a)(1) requires that a class be so numerous that joinder of all members is  
 21 impracticable. “The numerosity requirement ensures that the class action device is used only where  
 22 it would be inequitable and impracticable to require every members of the class to be joined  
 23 individually.” *Celano v. Marriot Int’l, Inc.*, 242 F.R.D. 544, 548 (N.D. Cal. 2007) (citing  
 24 Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial* § 10:258). However,  
 25 courts have recognized that “impractical” does not mean “impossible.” *Id.*; *Arnold v. United Artists*  
 26 *Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994) (citing *Harris v. Palm Springs Alpine*  
 27 *Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964)). To satisfy this requirement, Plaintiffs need not



1 state the exact number of class members, nor is there a threshold number above which  
2 impracticability is presumed. *See In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350-51  
3 (N.D. Cal. 2005); *Aguayo v. Oldenkamp Trucking*, 2005 WL 2436477, at \*12 (E.D. Cal. Oct. 3,  
4 2005). Rather, courts must examine the specific facts of each case. *Gen. Tel. Co.*, 446 U.S. at 330.  
5 In making this determination, courts may make common sense assumptions regarding whether  
6 joinder is impractical. *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. at 350 (finding that, as a  
7 matter of common sense, evidence that purported class of over 1,000 individuals or business entities  
8 dispersed throughout the United States was sufficient to establish that joinder of all class members is  
9 impracticable).

10 Here, Plaintiffs assert that Rule 23(a)(1)'s numerosity requirement "is readily established."  
11 Mot. at 5. In support, Plaintiffs proffer that CashCall "has made several hundred thousand loans  
12 since 2005 and in 2006 made over 75,000 loans of \$2,600 at 96% interest." *Id.* (citing Whitney  
13 Huston Decl. Ex. 23, Dkt. No. 65). Regarding the proposed California Class, Plaintiffs submit that  
14 CashCall made nearly 70,000 loans in 2005 to California borrowers. *Id.* Based on these figures,  
15 Plaintiffs contend that Class membership is likely to number in the tens of thousands, making  
16 joinder impracticable.

17 In its Opposition, CashCall does not present any argument regarding Plaintiffs' submission  
18 on the numerosity element. CashCall does, however, recognize that Plaintiffs' class definitions  
19 "include every CashCall borrower from June 30, 2004 – more than 388,000 people." Opp'n at 1.

20 As the foregoing summary illustrates, the parties gave short shrift to the numerosity element.  
21 Although Plaintiff cites to the total number of borrowers who executed loan agreements with  
22 CashCall, their national Class includes several subgroups for which Plaintiffs fail to provide any  
23 estimate. For instance, Plaintiffs seek to represent CashCall customers from whose accounts  
24 CashCall made multiple EFT withdrawals and customers who received collection letters. While  
25 information about the precise number of CashCall customers who would comprise these subclasses  
26 may be in CashCall's control and thus unavailable to Plaintiffs at this juncture, this does not relieve  
27 Plaintiffs of their burden of providing some estimate of the potential class members in these  
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1 subclasses for purposes of seeking class certification. However, to the extent that Plaintiffs' claims  
 2 rely on terms of CashCall's loan agreements, which all customers executed in order to receive a  
 3 loan, the Court finds that Plaintiffs have sufficiently demonstrated that the putative class members  
 4 are so numerous and are dispersed throughout the country, that joinder would be impracticable. *See*  
 5 *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. at 351. Accordingly, the Court finds that Rule  
 6 23(a)(1)'s numerosity requirement is satisfied.

7 *b. Commonality*

8 Next, under Rule 23(a)(2), Plaintiffs must establish that there are "questions of law or fact  
 9 common to the class." This element is satisfied if there exists a "common contention" that is of  
 10 "such a nature that it is capable of classwide resolution. . . ." *Dukes*, 131 S. Ct. at 2551. More  
 11 specifically, commonality requires the plaintiff to demonstrate that the class members have suffered  
 12 the same injury, not merely that they have all suffered a violation of the same provision of law. *Id.*  
 13 To meet this requirement, even a single common question is sufficient. *Id.* at 2556. At the same  
 14 time, in order to establish that a common legal or factual question underlies the class, named  
 15 plaintiffs must adequately demonstrate that any dissimilarities between the putative class members  
 16 do not vitiate the common question(s) that bind the putative members and makes class treatment  
 17 appropriate. *Id.* As the Supreme Court summarized:

18 What matters to class certification . . . is not the raising of common "questions" –  
 19 even in droves – but, rather, the capacity of a classwide proceeding to generate  
 20 common *answers* apt to drive the resolution of the litigation. Dissimilarities within  
 the proposed class are what have the potential to impede the generation of common  
 answers.

21 *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L.  
 22 Rev. 97, 132 (2009)). Thus, "where claims of the class are so factually and legally distinct as to be  
 23 completely separate, commonality is absent." *Andrews Farms v. Calcot, Ltd.*, 2009 WL 1211374, at  
 24 \*5 (E.D. Cal. May 1, 2009).

25 Here, Plaintiffs contend that issues common to the class are "clear," and proffer the  
 26 following chart:

Claim	Common Issues
Electronic Funds Transfers and related UCL Claims	<ul style="list-style-type: none"> <li>• CashCall collects payments multiple times within a given month from borrowers who are delinquent, without authorization.</li> <li>• In its take-it-or-leave-it contract, CashCall requires borrowers to agree to make payments through EFTs and its cancellation policy violates the EFTA.</li> </ul>
Rosenthal Act Claims and related UCL Claims	<ul style="list-style-type: none"> <li>• CashCall employs uniform and automated collection emails and letters [that] would mislead and deceive the “least sophisticated consumer” into believing he/she has to make payments through MoneyGram or with other certified funds.</li> <li>• CashCall’s standardized EFT practices (that is, multiple monthly withdrawals, conditioning) are unlawful debt collection methods in violation of the Rosenthal Act.</li> <li>• Whether CashCall’s automated telephone collection system annoys, abuses, and harasses its customers with excessive and unnecessary telephone calls.</li> </ul>
Unconscionable, Unfair and Unlawful Loan Terms	<ul style="list-style-type: none"> <li>• CashCall charges an interest rate of 90% or higher on its \$2,600 loan products.</li> <li>• CashCall systematically fails to take into account the borrowers [sic] ability to repay the loan, requiring aggressive collection practices.</li> <li>• The terms of CashCall’s loan, which are the same for each borrower, including the length of repayment, the interest only structure, and the high interest rate, are unfair.</li> </ul>

Mot. at 6. Aside from the foregoing list, Plaintiffs provide no substantive discussion regarding the common factual and legal issues they have identified.

In its Opposition, CashCall does not directly address whether Plaintiffs have met the commonality requirement under Rule 23(a)(2), but argues at various points in its brief that individual issues pervade each of Plaintiffs’ claims, thereby vitiating any commonality of issues or claims. *See Opp’n* at 1-3, 12, 16-23.

Looking first at the EFTA claims, Plaintiffs identify the common issues as: (1) “CashCall collects payments multiple times within a given month from borrowers who are delinquent without authorization”; and (2) “In its take-it-or-leave-it contract, CashCall requires borrowers to agree to make payments through EFTs and its cancellation policy violates the EFTA.” Mot. at 6. As to the first issue, assuming that the putative class members did not authorize more than one EFT

1 withdrawal during a month, whether CashCall's alleged practice of attempting to collect a  
2 delinquent loan payment through multiple EFT withdrawals in a single month violates the EFTA is  
3 an issue that is shared by all similarly-situated class members. Likewise, whether CashCall's  
4 alleged practice of requiring customers to agree to EFT payments and whether its EFT cancellation  
5 policy in effect before February 2007 violate the EFTA, also raise issues that are common to all  
6 putative class members who executed loan agreements with those provisions.

7 Turning to Plaintiffs' Rosenthal Act claims, Plaintiffs assert that there are four common  
8 issues among the class. First, Plaintiffs assert that "CashCall employs uniform and automated  
9 collection emails and letters [that] would mislead and deceive the 'least sophisticated consumer' into  
10 believing he/she has to make payments through MoneyGram or with other certified funds." *Id.* The  
11 Court queries whether this issue is common to the class. As discussed in greater detail below,  
12 whether a CashCall customer was mislead or deceived by statements made in CashCall's email  
13 messages and letters is a highly fact-specific, individualized inquiry. However, to the extent that  
14 Plaintiffs are claiming that CashCall's email messages and letters contained patently false or  
15 inaccurate information, for instance, stating that customers have no option other than to make  
16 payments through MoneyGram or with certified funds, when in fact they have the option of making  
17 payments through alternate forms (*e.g.*, cash payment), the falsity or inaccuracy of such  
18 representations would be common among all customers who received the communications.

19 Second, Plaintiffs assert that "CashCall's standardized EFT practices (that is, multiple  
20 monthly withdrawals, and conditioning loans on authorization of EFTs) are unlawful debt collection  
21 methods in violation of the Rosenthal Act." *Id.* To the extent that Plaintiffs have identified  
22 operating EFT practices that are uniformly applicable to CashCall's customers, the question of  
23 whether such practices constitute unlawful debt collection methods under the Rosenthal Act is an  
24 issue that is common to the class.

25 Third, Plaintiffs proffer, "[w]hether CashCall's automated telephone collection system  
26 annoys, abuses, and harasses its customers with excessive and unnecessary telephone calls" is a  
27 factual issue common to the class. *Id.* The Court, however, disagrees. Particularly, a customer's,  
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1 individualized, personal reaction to a collection phone call from CashCall is not an injury, fact, or  
2 legal question shared throughout the class. Rather, because each class member's reaction is unique  
3 and based on his or her own circumstance, the question of whether customers were either annoyed,  
4 abused, or harassed by CashCall's collection calls is not an issue that lends itself to classwide  
5 resolution. *See Dukes*, 131 S. Ct. at 2551.

6 Finally, the Court turns to Plaintiffs' proffered issues associated with their claims that  
7 challenge the legality and enforceability of the terms of the loan agreements. The first issue  
8 Plaintiffs identify is that "Cashcall charges an interest rate of 90% or higher on its \$2,600 loan  
9 products." Mot. at 6. Notably, the interest rates charged by CashCall were not uniform. However,  
10 Plaintiffs appear to draw the line at 90%, such that the issue would be whether a rate at that number  
11 or above is unconscionable. Framed in this way, whether an interest rate of 90% or above on a  
12 \$2,600 loan is unconscionable or otherwise illegal is a question of fact and law that is shared by all  
13 class members who accepted loans with such terms and is therefore capable of classwide resolution.

14 Next, Plaintiffs assert that "CashCall systematically fails to take into account the borrowers'  
15 ability to repay the loan, requiring aggressive collection practices." *Id.* To the extent that Plaintiffs  
16 are asserting that CashCall failed to utilize any screening procedure to determine if the class  
17 members who executed loan agreements qualified for such loans, the question of whether the lack of  
18 such procedure was unfair or unlawful is common to all class members.

19 Lastly, Plaintiffs assert that "[t]he terms of CashCall's loan, which are the same for each  
20 borrower, including the length of repayment, the interest only structure, and the high interest rate,  
21 are unfair." *Id.* Again, to the extent that Plaintiffs are asserting that certain uniform terms of the  
22 loan agreements violate some provision of law or are otherwise unenforceable, this would be an  
23 issue that is common to all class members who executed a loan agreement.

24 In sum, Plaintiffs have identified common issues of fact and law as to each of their claims  
25 that are sufficient to satisfy Rule 23(a)(2).

26 ///

27 ///

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1                   c.       *Typicality*

2           Third, Rule 23(a)(3) requires Plaintiffs to demonstrate that “the claims or defenses of the  
3 representative parties are typical of the claims or defenses of the class . . . .” “The test of typicality  
4 is whether other members have the same or similar injury, whether the action is based on conduct  
5 which is not unique to the named plaintiffs, and whether other class members have been injured by  
6 the same course of conduct.” *In re Tableware Antitrust Litig.*, 241 F.R.D. at 649 (citing *Hanon v.*  
7 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). “Typicality refers to the nature of the  
8 claim or defense of the class representative, and not to the specific facts from which it arose or the  
9 relief sought.” *Hanon*, 976 F.2d at 508 (internal citations omitted). “The purpose of the typicality  
10 requirement is to assure that the interest of the named representative aligns with the interests of the  
11 class.” *Id.* Thus, “representative claims are ‘typical’ if they are reasonably co-extensive with those  
12 of absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020.

13           Here, Plaintiffs argue that their claims arise from the same facts and legal theories as the  
14 putative class members’ and are therefore typical. Mot. at 7. Specifically, with respect to the EFTA  
15 claims, Plaintiffs contend that each of them were subjected to the identical practices to which all  
16 members of the proposed classes were subjected to — multiple draws from their bank accounts and  
17 CashCall’s practice of conditioning their loans upon the agreement to pay by EFT. *Id.* Regarding  
18 the Rosenthal Act claims, Plaintiffs assert that they were subjected to the same collection practices  
19 as the putative class members, including receiving misleading collection letters, being subjected to  
20 illegal collection methods in violation of the EFTA, and being harassed by the same telephone  
21 collection procedures. *Id.* Regarding claims based on the loan terms, Plaintiffs argue “each of the  
22 Plaintiffs’ loans was made at an unconscionably high interest rate, without CashCall acting in regard  
23 for their ability to repay the loan and under consumer adhesion contracts that were unfair and one-  
24 sided.” *Id.* Plaintiffs maintain that “[n]o peculiar circumstances apply to the Plaintiffs which  
25 distinguish their claims, or CashCall’s treatment of them, from other class members.” *Id.* at 7:25-26.

26           In response, CashCall does not proffer any direct challenge to Plaintiffs’ typicality argument.  
27 Rather, throughout its Opposition, CashCall repeatedly asserts that the claims Plaintiffs seek to  
28

1 assert require individualized inquiries into the circumstances surrounding each customer's loan and  
2 interactions with CashCall. Such arguments, however, go to the question of whether individual  
3 issues predominate, which the Court addresses at length, below. Setting that issue aside, the Court  
4 finds that, to the extent that Plaintiffs' claims stem from the same underlying conduct by CashCall –  
5 namely, the terms of the loan agreements and CashCall's subsequent collection practices – there is a  
6 sufficient nexus between Plaintiffs' claims and those of the putative class members. Thus, Rule  
7 23(a)(2)'s typicality requirement is satisfied.

8 *d. Adequacy of Representation*

9 The final requirement of Rule 23(a) is that Plaintiffs must be able to “fairly and adequately  
10 protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “To satisfy constitutional due process  
11 concerns, absent class members must be afforded adequate representation before entry of a judgment  
12 which binds them.” *Hanlon*, 150 F.3d at 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)).  
13 To determine whether representation is adequate under Rule 23(a)(4), the Court must assess  
14 whether: (1) the named plaintiffs and their counsel have any conflicts of interest with other class  
15 members; and (2) the named plaintiffs and their counsel will prosecute the action vigorously on  
16 behalf of the class. *Id.*

17 In their Motion, Plaintiffs contend that their claims are reflective of those of the putative  
18 class members' and the relief they seek is identical to that sought for the Classes. Mot. at 8.  
19 Plaintiffs thus assert that their interests are aligned with those of the Classes. *Id.* In its Opposition,  
20 CashCall has not identified any conflict between Plaintiffs and the Classes they seek to represent.  
21 Based on this Court's review, there is nothing in the record indicating that any actual or potential  
22 conflict exists between the named Plaintiffs and the putative class members.

23 As to the second inquiry, Plaintiffs contend that they have been pursuing the interests of the  
24 Classes by actively participating in this litigation. *Id.* Further, Plaintiffs submit that their counsel,  
25 The Sturdevant Law Firm and Arthur Levy, have extensive experience in prosecuting consumer  
26 protection class actions and that counsel is qualified to represent Plaintiffs and the Classes in this  
27 litigation. *Id.* The Court finds that Plaintiffs' have adequately demonstrated their commitment to  
28



1 pursuing this case on behalf of the Classes and counsel's ability to competently represent them in this  
2 litigation.

3 Taken together, the Court finds that Plaintiffs have established that they will fairly and  
4 adequately represent the interests of the class, as required by Rule 23(a)(4).

5 **D. Rule 23(b)(3) Requirements**

6 Having found that Plaintiffs have made a sufficient showing as to the Rule 23(a)  
7 requirements, Plaintiffs next must demonstrate that the action can be certified under any of the three  
8 categories listed in Rule 23(b). In their Motion, Plaintiffs seek certification of their claims pursuant  
9 to Rule 23(b)(3),<sup>2</sup> which provides that a class action may be maintained if:

10 the court finds that the question of law or fact common to class members predominate  
11 over any questions affecting only individual members, and that a class action is  
12 superior to other available methods for fairly and efficiently adjudicating the  
13 controversy.

14 Rule 23(b)(3)'s predominance and superiority requirements were added "to cover cases 'in  
15 which a class action would achieve economies of time, effort, and expense, and promote . . .  
16 uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or  
17 bringing about other undesirable results.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615  
18 (1997) (quoting Fed. R. Civ. P. 23(b)(3) Adv. Comm. Notes to 1966 Amend). Thus, "a central  
19 concern of the Rule 23(b)(3) predominance test is whether 'adjudication of common issues will help  
20 achieve judicial economy.'" *Vinole v. Countrywide Home Loans*, 571 F.3d 935, 944 (9th Cir. 2009).  
21 "This analysis presumes that the existence of common issues of fact or law have been established  
22 pursuant to Rule 23(a)(2); thus, the presence of commonality alone is not sufficient to fulfill Rule  
23 23(b)(3)." *Hanlon*, 150 F.3d at 1022. Instead, "Rule 23(b)(3) focuses on the relationship between  
24 the common and individual issues," and "tests whether proposed classes are sufficiently cohesive to  
25 warrant adjudication by representation." *Id.* Accordingly, "[w]hen common questions present a

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26 <sup>2</sup> In a footnote, Plaintiffs state that their claims for injunctive relief based on UCL violations,  
27 are also suitable for class certification under Rule 23(b)(2). Mot. at 3 n.2. Plaintiffs, however,  
28 present no argument in support of this request.

1 significant aspect of the case and they can be resolved for all members of the class in a single  
 2 adjudication, there is clear justification for handling the dispute on a representative rather than on an  
 3 individual basis.” *Id.* (internal quotations omitted). “Because no precise test can determine whether  
 4 common issues predominate, the Court must pragmatically assess the entire action and the issues  
 5 involved.” *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 489 (E.D. Cal. 2006). For  
 6 instance, “[c]ommon questions may predominate where the resolution of a question common to the  
 7 class would significantly advance the litigation.” *Id.*

8 In addition to establishing the predominance of common questions, Plaintiffs must establish  
 9 that a class action is superior to alternative methods of resolving the claims. Fed. R. Civ. P.  
 10 23(b)(3). To guide this assessment, Rule 23(b)(3) sets forth a list of factors relevant to the  
 11 superiority inquiry:

12 (A) the class members’ interests in individually controlling the prosecution or  
 13 defense of separate actions;

14 (B) the extent and nature of any litigation concerning the controversy already begun  
 15 by or against class members;

16 (c) the desirability or undesirability of concentrating the litigation of the claims in the  
 17 particular forum; and

(D) the likely difficulties in managing a class action.

18 Fed. R. Civ. P. 23(b)(3). “This inquiry ‘requires the court to determine whether maintenance of this  
 19 litigation as a class action is efficient and whether it is fair,’ such that the proposed class is superior  
 20 to other methods for adjudicating the controversy.” *Aho v. Americredit Fin. Servs., Inc.*, 2011 WL  
 21 3047677, at \*12 (S.D. Cal. Jul. 25, 2011) (quoting *Wolin v. Jaguar Land Rover N. Am., LLC*, 617  
 22 F.3d 1168, 1175-76 (9th Cir. 2010)).

### 23 1. Whether Common Questions Predominate

24 To determine whether common questions predominate, the Court must examine each of the  
 25 claims and defenses at issue in this case and assess whether generalized evidence would prove those  
 26 elements on a class-wide basis, or whether individual proof is needed to establish each class  
 27 member’s entitlement to relief based on the facts and law of the case. *See* Joseph M. McLaughlin,

1 *McLaughlin on Class Actions: Law and Practice* § 5:23(7th ed. 2011). “If the evidence needed to  
 2 make a prima facie showing on a given question requires members of the proposed class to present  
 3 evidence that varies from member to member, then it is an individual question. If the same evidence  
 4 will permit each class member to make a prima facie showing, a question is common.” *Id.*

5 *a. EFTA Claims*

6 Plaintiffs’ first claim is for violation of the EFTA, 15 U.S.C. § 1693, and Federal Reserve  
 7 Regulation E, 12 C.F.R. § 205. Compl. at 8-10. Section 1693e addresses preauthorized transfers  
 8 and provides, in relevant part:

9 (a) A preauthorized electronic fund transfer from a consumer’s account may be  
 10 authorized by the consumer only in writing, and a copy of such authorization shall be  
 11 provided to the consumer when made. A consumer may stop payment of a  
 12 preauthorized electronic fund transfer by notifying the financial institution orally or  
 13 in writing at any time up to three business days preceding the scheduled date of such  
 14 transfer. The financial institution may require written confirmation to be provided to  
 15 it within fourteen days of an oral notification if, when the oral notification is made,  
 16 the consumer is advised of such requirement and the address to which such  
 17 confirmation should be sent.

18 15 U.S.C. § 1693e(a). In this action, Plaintiffs’ EFTA claim is based on three theories: (1) that  
 19 CashCall initiated unauthorized EFTs in an attempt to collect loan installment payments from  
 20 Plaintiffs’ and the putative class members’ bank accounts (the “multiple sweeps” or “double  
 21 dipping” claim); (2) that CashCall illegally conditioned the extension of credit on a customer  
 22 agreeing to electronic payment (the “conditioning” claim); and (3) that CashCall required customers  
 23 to submit a written request for cancellation of their EFT authorization seven days before the EFT  
 24 withdrawal date (the “cancellation” claim). Mot. at 8-12. The Court will evaluate each theory in  
 25 turn.

26 Plaintiffs first assert that CashCall violated § 1693e(a) by initiating unauthorized EFTs from  
 27 Plaintiffs’ and class members’ accounts after a scheduled EFT for a regular monthly loan payment  
 28 was returned unsatisfied due to insufficient funds. Mot. at 8-11. Specifically, Plaintiffs contend that  
 CashCall’s standard Promissory Note and Disclosure Statement contains an “Electronic Funds  
 Authorization” provision which authorizes CashCall to withdraw a scheduled monthly loan payment

1 from the customer's checking account on a specified day each month.<sup>3</sup> Mot. at 9 (citing to Huston  
 2 Decl., Ex. 11 at P0352). According to Plaintiffs, "[i]f CashCall processes an EFT on the scheduled  
 3 day of the month to collect a regular installment payment, and the EFT is returned unsatisfied,  
 4 CashCall then attempts to collect the same installment a second or third time during the same  
 5 month." *Id.* Plaintiffs state that during the first 30 days of delinquency, CashCall refers to its  
 6 practice of multiple EFTs as "Rerun ACH,"<sup>4</sup> and after 30 days of delinquency, it refers to the  
 7 multiple sweeps as "Backend ACH." Mot. at 9 (citing to Huston Decl., Ex. 26 at 117:2-126:18,  
 8 143:19-145:22, 147:17-148:11). CashCall documents Rerun and Backend ACHs in its Payment  
 9 Transaction Histories and Customer Contact ("Servicing Transaction") Logs. Mot. at 9 (citing  
 10 Huston Decl., Ex. 26 at 136-137; Ex. 7 at CC512-13; Ex. 8 at CC6417, 6427-28; Ex. 9 at CC309-13;  
 11 Ex. 27 at CC 479, 482-83; Ex. 28 at CC 6432-33, 6444, 6491; Ex. 29 at 19, 22, 26, 28-29, 37-41).

12 Plaintiffs assert that the written authorization in the Promissory Notes only allows CashCall  
 13 to initiate an EFT to withdraw the scheduled loan payment on the single, specified, recurring day of  
 14 the month (usually the first day), and does not authorize CashCall to run multiple sweeps for the  
 15 same payment on later days of the month of CashCall's choosing. Mot. at 10. Plaintiffs thus charge  
 16 that "CashCall's Rerun and Backend ACHs are unauthorized raids on its customers' bank accounts .  
 17

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18 <sup>3</sup> Specifically, the Electronic Funds Authorization states:  
 19

20 I hereby authorize CashCall to withdraw my scheduled loan payment from my  
 21 checking account on or about the FIRST day of each month. I further authorize  
 22 CashCall to adjust this withdrawal to reflect any additional fees, charges or credits to  
 23 my account. I understand that CashCall will notify me 10 days prior to any given  
 24 transfer if the amount to be transferred varies by more than \$50 from my regular  
 25 payment amount. I understand that this authorization and the services undertaken by  
 26 CashCall in no way alters or lessens my obligations under the loan agreement. I  
 27 understand that I can cancel this authorization at any time (including prior to my first  
 28 payment due date) by sending written notification to CashCall. Cancellations must  
 be received at least seven days prior to the applicable due date.

Huston Decl., Ex. 11 at P0352.

<sup>4</sup> "ACH" stands for Automatic Clearing House. Huston Decl., Ex. 22 at CC944.

1 . . .” *Id.*

2 With respect to the specific instances of unauthorized EFTs, Plaintiffs assert that CashCall  
3 conducted Rerun and Backend ACHs on all three of their accounts, and cite to their respective Loan  
4 Transaction History reports documenting such transactions in support. Mot. at 10 (citing Huston  
5 Decl., Ex. 7 (De La Torre report); Ex. 8 (Saysourivong report); Ex. 9 (O’Donovan report)).  
6 Plaintiffs argue that this evidence demonstrates that factual and legal issues exist that are common to  
7 the Class. Particularly, Plaintiffs advance that “class members whose CashCall Loan Transaction  
8 History and Servicing Transaction Logs reflect these illegal ‘ACH’ transactions have a remedy  
9 under the EFTA to redress CashCall’s common illegal practices and common proof of this claim  
10 predominates.” Mot. at 10-11. Thus, Plaintiffs contend that common issues predominate this claim.

11 In its Opposition, CashCall argues that determining whether a borrower authorized a  
12 particular EFT transaction raises numerous individual questions. Opp’n at 9. First, it argues that  
13 111,000 borrowers never had an ACH rerun due to insufficient funds in the borrower’s account. *Id.*  
14 (citing Bennett Decl. ¶ 26, Dkt. No. 82). Second, CashCall argues that beginning in February 2007,  
15 the Electronic Funds Authorization and Disclosure was amended to state: “I also authorize you to  
16 withdraw funds from my account on additional days throughout the month in the event that I am  
17 delinquent on my loan payments.” *Id.* (citing Post Decl. ¶ 21 & Ex. F, Dkt. No. 77). It therefore  
18 argues that not all class members are similarly situated because every borrower since February 2007  
19 expressly authorized multiple EFT debits. *Id.* Third, CashCall argues that Plaintiffs “ignore the  
20 numerous individual questions that impact whether an ACH rerun is authorized.” *Id.* at 9-10.  
21 Particularly, it contends that if an EFT payment is returned for insufficient funds, it attempts to  
22 contact the customer to work out a resolution, which may lead to the customer authorizing a second  
23 ACH run on a specific date or making alternate payment arrangements, including making their  
24 regular payment in two installments. *Id.* at 10 (citing Bennett Decl. ¶¶ 10, 21, 24). Finally, CashCall  
25 argues that Plaintiffs cannot establish a uniform claim for damages, which they have identified as the  
26 funds unlawfully collected and fees imposed by the bank if the collection EFT was returned  
27 unsatisfied. *Id.* CashCall contends that Plaintiffs’ proposed class would include individuals who  
28

1 had an EFT rerun, but had sufficient funds on the rerun, as well as individuals who still lacked  
2 sufficient funds. *Id.* As to the first group, it asserts that there is no actual damages, while as to the  
3 second group, it claims that they may have suffered damages, but the amount of damages would  
4 depend on the fees charged. *Id.* Accordingly, CashCall submits that “[d]etermining the amount of  
5 damage and whether it resulted from CashCall’s alleged conduct necessarily would involve  
6 individual issues.” *Id.*

7       The Court has carefully considered the parties’ arguments and supporting materials, and  
8 agrees with CashCall that individual issues predominate this claim. While Plaintiffs have  
9 demonstrated that a common issue exists as to CashCall’s multiple sweeps practice, CashCall has, in  
10 turn, demonstrated that there are sufficient individual issues that would come to the forefront in  
11 litigating this claim. In particular, while Plaintiffs contend that the Court would only need to  
12 examine CashCall’s transaction logs to determine whether a delinquent borrower was subjected to  
13 an unauthorized sweep, CashCall has identified evidence indicating that in some instances the  
14 delinquent borrower consented to CashCall initiating an EFT withdrawal on a date other than that  
15 specified in the loan agreement or an alternate payment arrangement. Thus, to determine whether an  
16 EFT withdrawal or attempted withdrawal was unauthorized, the Court would need to examine more  
17 than simply the transaction logs. Rather, it must also consider any evidence CashCall may have that  
18 shows a specific borrower authorized or consented to the EFT. Further, if Plaintiffs successfully  
19 established that the multiple EFT withdrawals violated the EFTA, neither Plaintiffs nor the putative  
20 class members sustained uniform damages. Instead, as CashCall points out, Plaintiffs contend that  
21 the damages for this claim include funds unlawfully collected and any bank NSF fees that each  
22 delinquent borrower incurred. As a result, the issue of damages not only presents an issue that  
23 would need to be evaluated on a case-by-case basis, but makes class treatment of this class  
24 unmanageable. Accordingly, the Court finds that individual issues outnumber the common issues  
25 involved with this claim. The Court therefore finds that it fails to meet Rule 23(b)(3)’s requirement.

26       Plaintiffs’ second theory for the EFTA claim is that CashCall illegally conditioned the  
27 extension of credit on each customer agreeing to electronic payment by preauthorized EFTs, in  
28

1 violation of the EFTA. Compl. ¶ 48; Mot. at 11. Pursuant to 15 U.S.C. § 1693k(1), “No person may  
2 . . . condition the extension of credit to a consumer on such consumer’s repayment by means of  
3 preauthorized electronic fund transfers.” In their Motion, Plaintiffs argue that “CashCall engaged in  
4 the classwide practice of requiring loan applicants to click on a box at the conclusion of the  
5 Electronic Funds Authorization and Disclosure stating, ‘I understand CashCall’s payment collection  
6 policy and authorize electronic debits from my bank account.’” Mot. at 11 (citing Huston Decl., Ex.  
7 11 at P0352). According to Plaintiffs, each class member was required to sign the standard  
8 Promissory Note containing this EFT payment provision and CashCall would not fund a loan unless  
9 the customer checked the box agreeing to EFT payments, thereby violating § 1693k(1) and giving  
10 rise to a class-wide claim. *Id.* at 11-12 (citing Huston Decl., Ex. 3 at 846-50).

11 In its Opposition, CashCall denies that it conditioned loans on a customer’s consent to EFT  
12 payments and proffers various arguments in support. Opp’n at 8. It argues that the Promissory Note  
13 disclosed that a customer could opt-out of EFT payments at any time – even prior to their first  
14 payment – and that it routinely honors requests to cancel or change EFT authorizations. *Id.* (citing  
15 Bennett Decl. ¶¶ 8, 10, 14, 15 & Exs. A, B). CashCall further argues that it was not the lender on  
16 tens of thousands of loans originated outside of California, but rather purchased those loans from  
17 third-party banks. Opp’n at 8-9. As to those loans, it contends that “[n]o out-of-state borrower can  
18 assert a claim that CashCall conditioned their loan on signing an EFT authorization.” Opp’n at 9.  
19 Notably, CashCall does not proffer any discussion as to what individual issues exist and how they  
20 compare to any common issues.

21 The Court has considered the parties’ arguments and agrees with Plaintiffs that common  
22 issues predominate this claim. Whether CashCall’s practice of requiring borrowers to consent to  
23 EFT payments is common to all borrowers who executed a CashCall Promissory Note, and CashCall  
24 has not articulated what individual issues would need to be addressed to resolve this claim.  
25 However, the Court agrees with CashCall that only borrowers whose loans originated with CashCall  
26 are proper members of this class.

27 Plaintiffs’ third theory for the EFTA claim is that CashCall’s policy of requiring customers  
28



1 to submit a written request for cancellation of their EFT authorization seven days before the EFT  
2 withdrawal date violated § 1963e(a). As set forth above, § 1963e(a) provides that “[a] consumer  
3 may stop payment of a preauthorized electronic fund transfer by notifying the financial institution  
4 orally or in writing at any time up to three business days preceding the scheduled date of such  
5 transfer.” Plaintiffs argue that because the promissory note that each of them, as well as each  
6 putative class member, signed contained this provision, the issue of whether the seven-day  
7 cancellation requirements violated § 1963e(a) is “universal to the Class.” Mot. at 12.

8 CashCall counters that “[n]ot all putative class members are commonly situated because their  
9 promissory notes differed.” Opp’n at 10. Specifically, CashCall indicates that while from July 2004  
10 to February 2007 its standard promissory note stated that requests must be received seven calendar  
11 days before the due date, after February 2007, it amended the promissory note to state that requests  
12 must be received three business days in advance of the due date. Opp’n at 10 (citing Bennett Decl. ¶  
13 15 & Ex. A, B.). Further, CashCall argues that, regardless of the terms of the EFT Authorization, its  
14 practice has been to always promptly process cancellation requests and that it typically could cancel  
15 an EFT as long as the request was received before the next scheduled transaction. Opp’n at 10.  
16 Thus, it argues that requests to cancel EFT authorization “necessarily involve individual issues and  
17 will depend on the borrower’s interaction with the CashCall customer service representative.”  
18 Opp’n at 11.

19 The Court, however, is unpersuaded by CashCall’s argument. As Plaintiffs have pointed out,  
20 at least prior to February 2007, the EFT Authorization in CashCall’s standard Promissory Note  
21 expressly stated that to cancel an EFT, CashCall must receive the cancellation at least seven days  
22 before the payment due date. Because this provision uniformly appeared in its Promissory Notes,  
23 the issue whether the seven-day advance cancellation requirement violates § 1693e(a) is common to  
24 Plaintiffs and all class members who executed promissory notes prior to February 2007, and the  
25 evidence necessary to establish this claim – which consists mainly of the express language in the  
26 Promissory Note – is uniform to all class members. CashCall has failed to identify any individual  
27 issues or evidence that would be necessary to address this claim. Thus, the Court agrees with  
28

1 Plaintiffs that common issues predominate this claim.

2 *b. Rosenthal Act Claims*

3 Plaintiffs' third claim is for violation of California's Rosenthal Fair Debt Collection  
4 Practices Act, codified at California Civil Code section 1788. Compl. at 12-13. Again, Plaintiffs  
5 allege several discrete violations by CashCall.

6 First, Plaintiffs allege that when a customer's loan becomes delinquent, CashCall's  
7 automated collection system generates form collection letters and email messages that falsely  
8 suggest to customers that they must make up their payments with certified funds. Mot. at 12-13.  
9 Plaintiffs allege that CashCall sends a form letter and/or email to customers whenever an EFT  
10 installment payment is returned unpaid by the customer's bank, which states, in pertinent part:

11 Your loan is now past due and you must immediately replace this payment via  
12 MoneyGram transaction in the amount of [\$—] (see instructions below).

13 [. . .]

14 MONEYGRAM INSTRUCTIONS:

15 [. . .]

16 To find a MoneyGram location near you, please visit MoneyGram.com or contact a  
17 CashCall agent at [telephone number].”

18 Mot. at 13 (citing Ex. 17).

19 Plaintiffs contend that CashCall also uses a form “breach” letter and/or email, which it sends  
20 to borrowers when the account is more than 30 days delinquent, which provides in relevant part:

21 You have breached your contract and your [Loan #] with CashCall, Inc. is now in  
22 default. You must bring the loan current by sending the amount shown below to CashCall, Inc. in t

23 *Id.* (citing Ex. 30).

24 Plaintiffs further submit that CashCall also included the “standard MoneyGram demand” in  
25 its “breach of promise to pay” letters and/or emails that it generated and sent to customers who  
26 failed to pay in accordance with a promise to pay (“PTP”). *Id.* (citing Ex. 33). This communication  
27 stated in relevant part:

28 In our recent telephone conversation, you promised to pay \$\_\_\_\_\_ on (date). We have  
not received your payment at this point and you are past due on your loan with  
CashCall, Inc. You must bring the loan current immediately by sending this agreed  
upon amount to CashCall in the form of a money order, money gram, or certified  
check.

*Id.*

1 Finally, Plaintiffs contend that CashCall uses a form “every opportunity” letter and/or email  
2 that it sends to customers when a loan becomes sixty days delinquent, which demands payment by  
3 MoneyGram, stating: “Please note that payments must be made with certified funds only (cashier’s  
4 check payable to CashCall or a money transfer via MoneyGram Express Payment, Receiver code  
5 3299).” *Id.* at 14 (citing Ex. 35).

6 Plaintiffs assert that, “[b]ecause CashCall’s practice in sending the communications is  
7 uniform and the likelihood to deceive is a single objective, class-wide determination, common issues  
8 predominate on the Rosenthal Act deception claims.” *Id.* at 14. Particularly, Plaintiffs indicate that  
9 they “intend to show at trial that CashCall’s communications would lead the least sophisticated  
10 consumer to believe that he/she had to respond to these letters by paying with certified funds, most  
11 notably MoneyGrams. By insisting on certified funds, CashCall left the misleading impression that  
12 a borrower who failed to pay with certified funds would suffer adverse consequences, such as  
13 rejection of the payment and legal action.” *Id.*

14 CashCall, however, maintains that individual issues predominate this claim because not all  
15 borrowers received the same collection letters. Opp’n at 12. Rather, CashCall asserts that neither  
16 Plaintiffs nor all borrowers received each of the four emails/letters. *Id.* CashCall also asserts that  
17 individual issues predominate because not all borrowers who received one of the emails or letters  
18 would interpret it the same way; instead, a borrower’s interpretation of the emails would necessarily  
19 depend on their interactions with CashCall. Opp’n at 12-13. For example, CashCall argues that  
20 after receiving the letters/emails, Plaintiff O’Donovan made payments by personal check. *Id.* at 13.

21 Further, CashCall argues that the cases Plaintiffs cite where courts have certified Rosenthal  
22 Act class actions – namely *Gonzales v. Arrow Financial Services LLC*, 233 F.R.D. 577 (S.D. Cal.  
23 2006), and *Palmer v. Stassinis*, 233 F.R.D. 546 (N.D. Cal. 2006) – “all involved one specific  
24 unlawful practice that could be determined from the collection letter itself.” *Id.* CashCall, however,  
25 does not proffer any argument expanding on this assertion. In their Reply, Plaintiffs argue that  
26 although there are four different collection letters/emails that may have minor factual variations,  
27 they all conveyed the same message: that payment with MoneyGram or other certified funds was  
28

1 required. Reply at 10, Dkt. No. 87. They also argue that, contrary to CashCall's assertion, all three  
2 named Plaintiffs responded to these letters by making numerous MoneyGram payments. *Id.*

3       The Court has carefully considered the parties' arguments and finds that CashCall has  
4 sufficiently demonstrated that individual issues predominate Plaintiffs' Rosenthal Act claim based  
5 on CashCall's collection letters and email messages. As CashCall points out, not all borrowers  
6 received each of the four letters/email messages at issue. Rather, the correspondence a delinquent  
7 borrower received depended on that borrower's particular circumstances (*e.g.*, installment payment  
8 returned unpaid, breach of promise to make payment). While the letters and email messages contain  
9 similar language regarding the means of payment, the language is not identical, but varies between  
10 each of the four letters/email messages. As a result, litigation of this claim requires a determination  
11 of which class members received which of the four letters/email messages and an assessment of each  
12 of the communications separately. Thus, the Court agrees with CashCall that the instant claim is  
13 different from those addressed in the cases Plaintiffs' rely upon where a single representation was at  
14 issue and applied to all class members. Moreover, to the extent that a borrower's conduct in  
15 response to the correspondence is admissible to show how the communications were interpreted, this  
16 requires borrower-specific information. Accordingly, the Court finds that individual issues  
17 predominate this claim.

18       Plaintiffs next charge that CashCall's systematic use of automated telephone collection calls  
19 to coerce consumers to make a payment on a delinquent loan violates the Rosenthal Act and the  
20 FDCPA. Mot. at 15. The Rosenthal Act bars a creditor from "[c]ausing a telephone to ring  
21 repeatedly or continuously to annoy the person called" and from "[c]ommunicating, by telephone or  
22 in person, with the debtor with such frequency as to be unreasonable and to constitute harassment to  
23 the debtor under the circumstances." Cal. Civ. Code §§ 1788.11(d) & (f). Concurrently, the federal  
24 FDCPA prohibits "engag[ing] in any conduct the natural consequence of which is to harass, oppress,  
25 or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. Particularly,  
26 this includes "[c]ausing a telephone to ring or engaging any person in telephone conversation  
27 repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."  
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1 15 U.S.C. § 1692d(5).

2 According to Plaintiffs, “CashCall’s automated telephone system is designed to generate a  
3 huge and repeating volume of annoying collection calls. Plaintiffs contend this system generates so  
4 many and such frequent calls that it violates the fair debt collection laws.” Mot. at 15. In support,  
5 Plaintiffs cite to CashCall’s Servicing Transaction Logs for each of the three Plaintiffs, arguing that  
6 each log shows “a shocking number of outgoing CashCall telephone calls.” *Id.* (citing Exs. 27, 28,  
7 29). Plaintiffs also proffer a lengthy description of how CashCall’s predictive dialer system  
8 operates. *Id.* at 16-17.

9 Plaintiffs submit that because CashCall’s telephone collection practices are automated and  
10 systematized, they apply uniformly to the class, and thus common issues predominate. *Id.* at 15.  
11 CashCall, however, asserts that the critical question is how CashCall used its predictive dialer  
12 system in specific situations and how each borrower who received a call reacted. Opp’n at 14.  
13 CashCall further submits that, contrary to Plaintiffs’ assertion, not all of its collection calls are made  
14 by the predictive dialer and the type of call depends on the length of a borrower’s delinquency.  
15 Opp’n at 14 (citing Klopstock Decl. ¶¶ 13, 15, 17, 19). Additionally, CashCall argues that, to the  
16 extent that Plaintiffs base their claim on call volume, each Plaintiff – and each putative class  
17 member for that matter – received a different number of phone calls, thereby raising individual  
18 issues.

19 The Court has carefully considered the parties’ arguments and agrees with CashCall that  
20 individual issues dominate this claim. In particular, the frequency of calls is not uniform among the  
21 Plaintiffs or potential class members and the issue of whether the phone calls were harassing,  
22 annoying, or abusive requires an individualized analysis. Thus, Plaintiffs have failed to meet the  
23 23(b)(3) predominance requirement as to this claim.

24 Plaintiffs also assert that CashCall’s alleged unauthorized EFTs in a single month amounts to  
25 an illegal collection practice in violation of the Rosenthal Act. Mot. at 15 (citing 15 U.S.C. §§  
26 1692e(5) & 1692f(1)). Thus, they argue that common issues also predominate on the parallel claim  
27 under the Rosenthal Act. However, as discussed above, the Court finds that individual issues  
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1 predominate any common issues associated with Plaintiffs' double-dipping claim. Accordingly, this  
2 claim is not suitable for class treatment.

3 *c. Plaintiffs' UCL Claims*

4 Plaintiffs bring three claims for violation of California's UCL. Compl. at 13-18. The UCL  
5 prohibits "any unlawful, unfair or fraudulent business act or practice . . ." Cal. Bus. & Prof. Code §  
6 17200. This section "establishes three varieties of unfair competition — acts or practices which are  
7 unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as unfair or deceptive  
8 even if not unlawful and vice versa." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20  
9 Cal. 4th 163, 180 (1999) (internal quotations and citations omitted).

10 Plaintiffs allege violations of the unlawful and unfair prongs of their UCL as independent  
11 bases for class-wide relief. Mot. at 18.

12 *i. The "Unlawful" Prong*

13 Plaintiffs allege that CashCall has engaged in unlawful business practices based on its  
14 alleged violations of the EFTA, the Rosenthal Act, California Financial Code section 22303,  
15 California Civil Code section 1670.5, and California Financial Code section 22150 and its  
16 accompanying regulation, Title 10 of the California Code of Regulations, section 1452.

17 *(a) EFTA and Rosenthal Act Violations*

18 Plaintiffs argue that because their claims for violation of the EFTA and Rosenthal Act are  
19 appropriate for class treatment, their UCL claim under the unlawful prong based on underlying  
20 violations of these laws, are also suitable for class treatment. Mot. at 18 n. 5. In its Opposition,  
21 CashCall argues that this UCL claim cannot be certified for the same reasons that the underlying  
22 claims cannot be certified. Opp'n at 16 n. 20. As discussed above, Plaintiffs have sufficiently  
23 shown that their EFTA claim based on CashCall's alleged conditioning of loans on consent to EFT  
24 payments and the seven-day cancellation policy in CashCall's Promissory Note meet the criteria for  
25 class treatment. Because Plaintiffs' UCL claim under the unlawful prong may premised on the same  
26 underlying violations, it is also appropriate for class treatment.

(b) Cal. Fin. Code § 22302 and Cal. Civ. Code § 1670.5

Pursuant to California Financial Code section 22302(a), “Section 1670.5 of the [California] Civil Code applies to the provisions of a loan contract that is subject to [the California Finance Lenders Law].” Cal. Fin. Code § 22302(a). Section 22302(b) further provides that “[a] loan found to be unconscionable pursuant to Section 1670.5 of the Civil Code shall be deemed to be in violation of this division and subject to the remedies specified in this division.” Civil Code section 1670.5, in turn, provides that if a court finds, as a matter of law, that a contract, or any provision thereof, is unconscionable at the time it was made, it may “refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

Here, Plaintiffs assert that CashCall makes loans with unconscionable interest rates of 90% or higher, in violation of Financial Code section 22302, Civil Code section 1670.5, and the UCL. Mot. at 19-20. Plaintiffs argue that a determination of CashCall’s liability may be made on a classwide basis based on common proof. *Id.* at 18. According to Plaintiffs, “[i]t is CashCall’s conduct in making loans at these unconscionable interest rates – not the individual conduct or situation of each class member who borrowed from CashCall – that will be the focus of the Court’s inquiry in determining the legality of the practice.” *Id.* Specifically, Plaintiffs argue that “[t]he unconscionability analysis will turn on the standard interest rate that CashCall charged in each of its transactions with class members who purchased the \$2,600 loan product and were charged an interest rate of 90% or higher.” Mot. at 19-20.

In California,

[T]he law has clearly established that the term [“unconscionable”] has both a procedural and a substantive element. The former takes into consideration the parties’ relative bargaining strength and the extent to which a provision is ‘hidden’ or unexpected, while the substantive element requires terms that ‘shock the conscience’ or at the least may be described as ‘harsh or oppressive.’ Both elements must be present, but ‘the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.

*Trend Homes, Inc. v. Superior Court*, 131 Cal. App. 4th 950, 956 (2005) (internal citations omitted).



1 Further, the terms “harsh,” “oppressive,” and “shocks the conscience” are “not synonymous with  
2 ‘unreasonable,’” and “it is important that courts not be thrust into the paternalistic role of  
3 intervening to change contractual terms that the parties have agreed to merely because the court  
4 believes the terms are unreasonable.” *Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 809  
5 (2006); *see Camillo v. Wash. Mut. Bank, F.A.*, 2009 WL 3614793, at \*7 (E.D. Cal. Oct. 27, 2009).

6 Plaintiffs argue that both the procedural and substantive components can be proven on a  
7 class-wide basis. Mot. at 20. With respect to procedural unconscionability, Plaintiffs argue that it  
8 will be proven by establishing that CashCall’s promissory notes are adhesion contracts that were  
9 offered on a take-it-or-leave it basis, without any opportunity for negotiation of the loan terms. *Id.*  
10 (citing Huston Decl., Ex. 13 at 175: 4-15, 236:12-237:1, 239:12-242:25). Plaintiffs assert that  
11 because all class members were in this position, whether the contract is a contract of adhesion, and  
12 therefore procedurally unconscionable, is a common question for all class members. *Id.*

13 CashCall, on the other hand, argues that the procedural unconscionability element raises  
14 individual issues. Opp’n at 18-23. CashCall argues that the procedural unconscionability analysis  
15 focuses on all of the circumstances surrounding contract formation and requires a finding of surprise  
16 or oppression, which are individual questions. Opp’n at 18. It argues that Plaintiffs cannot establish  
17 surprise because it disclosed the interest rates, and that any determination of surprise would require  
18 the Court to examine testimony from each class member about whether he or she read the contract or  
19 whether they were aware of the interest rate from some other source. Opp’n at 19-20. CashCall also  
20 contends that during its “fluid” loan process, each borrower receives different disclosures about the  
21 loans and has different interactions with CashCall through which they get information about the  
22 loan. Opp’n at 20-21. However, as Plaintiffs point out, they do not base their procedural  
23 unconscionability argument on a surprise theory. Reply at 11. Thus, the Court agrees with Plaintiffs  
24 that CashCall’s arguments are inapposite.

25 Alternatively, CashCall asserts that individual issues predominate the issue of alleged  
26 oppression. Opp’n at 23. Particularly, CashCall contends that to determine whether the loan  
27 agreements were oppressive the Court must examine whether a borrower attempted to obtain a loan  
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1 on more favorable terms. Opp’n at 23. It asserts that “the potential availability of other lending  
2 sources renders a class-wide determination of oppression improper.” *Id.* However, as Plaintiffs  
3 point out, California courts “have routinely found the procedural element satisfied where the  
4 agreement containing the challenged provision was a contract of adhesion.” *Gatton v. T-Mobile*  
5 *USA, Inc.*, 152 Cal. App. 4th 571, 582 (2007). As the *Gatton* court held: “absent unusual  
6 circumstances, use of a contract of adhesion establishes a minimal degree of procedural  
7 unconscionability notwithstanding the availability of market alternatives.” *Id.* at 585. Consumer  
8 choice is therefore relevant, but not dispositive, to an assessment of procedural unconscionability  
9 *Id.* at 583. More importantly, CashCall has not shown that the question whether the loan agreements  
10 were oppressive is incapable of being determined on a classwide basis. *See, e.g., Shroyer v. New*  
11 *Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981-84 (9th Cir. 2007) (class action finding class  
12 arbitration waiver procedurally unconscionable); *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d  
13 1181, 1188-1190 (finding arbitration provision procedurally unconscionable in putative class  
14 action). As Plaintiffs note, the putative class members all stood in the same position in relation to  
15 CashCall when applying for their loans and all were foreclosed from negotiating any of the terms of  
16 the Promissory Notes. Thus, the procedural unconscionability assessment, which analyses contract  
17 formation, would apply across the board to all class members.

18 CashCall also asserts that it has modified 51,581 loans and granted 102,251 deferments.  
19 Opp’n at 23. Without any meaningful explanation, it argues that its “willingness to modify loans is  
20 another factor cutting against certifying the unconscionability claim.” *Id.* However, whether  
21 CashCall subsequently modified loans does not go to the issue of whether the loan agreement was  
22 oppressive at the time it was entered into by the borrower.

23 As to substantive unconscionability, Plaintiffs argue that the issue whether the interest rate  
24 was unfairly one-sided requires a single determination for all class members, without regard to the  
25 particular circumstances of each class member who signed the contract. Mot. at 20. Specifically,  
26 Plaintiffs argue that “[c]ommon evidence of substantive unconscionability will show that CashCall  
27 offered its standard \$2,600 loan product at 90+% interest uniformly on a class-wide basis.” *Id.*  
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1 They further attest that they will proffer evidence on a class-wide basis that CashCall's high interest  
2 rate was one-sided and "well outside of industry norms." *Id.* at 21. In its Opposition, CashCall  
3 asserts that high interest rates alone cannot establish unconscionability and that its loans are exempt  
4 from California's usury restrictions. Opp'n at 17-18 & fn 21. CashCall also argues that Plaintiffs  
5 have failed to cite any California decision certifying a class action based on an allegedly  
6 unconscionable interest rate. *Id.* at 17.

7 In *Carboni v. Arrospide*, 2 Cal. App. 4th 76, 83-86 (1992), the California Court of Appeal  
8 held that a secured loan with an interest rate of 200% was both procedurally and substantively  
9 unconscionable. In analyzing whether the loan was substantively unconscionable, the court first  
10 evaluated the interest rate of the loan as compared to the prevailing rate charged for similar loans in  
11 the credit market, and found that it was uncontested that the 200% interest rate was approximately  
12 ten times that charged in the credit market for comparable loans. *Id.* at 84. Next, the court analyzed  
13 the circumstances of the transaction *Id.* In particular, in making this inquiry, the court noted that  
14 "substantive unconscionability turns not only on a one-sided result, but also on an absence of  
15 justification for it." *Id.* at 850 (internal quotations omitted) (citing *A&M Produce Co. v. FMC*  
16 *Corp.*, 135 Cal. App. 3d 473, 484 (1982)). The lender in *Carboni* argued that the high interest rate  
17 was justified because no other charges were made for the loan and, if the borrower would have paid  
18 it off as scheduled, the loan would have been cheaper to alternatives available to the borrower. *Id.*  
19 The court, however, was unpersuaded by these arguments and found that they failed to justify a  
20 200% rate on the amount borrowed. *Id.* at 85.

21 In this case, the same issues relating to substantive unconscionability could be determined on a  
22 class wide basis without raising individual issues. Evidence regarding the 90% and above interest  
23 rates CashCall charged on its loans could be compared to those of similar loans in the credit market  
24 and any finding would be uniformly applicable to all class members whose loan had an interest rate  
25 at or above that amount. Additionally, any justification CashCall has for charging interest rates  
26 above 90% would not trigger any individual, borrower-specific questions of fact or law.

27 Taken together, the Court finds that both procedural and substantive unconscionability can  
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1 be determined on a classwide basis. It therefore finds that common issues predominate Plaintiffs'  
 2 UCL claim for violation of California Finance Code section 22303 and Civil Code section 1670.5  
 3 based on the interest rate charged to borrowers.

4 (c) Cal. Fin. Code § 22150 and California Code of Regulations,  
 5 Title 10, § 1452

6 Plaintiffs also assert that CashCall violated California Financial Code section 22150 through  
 7 its practice of funding loans without regard to the borrower's ability to repay the loan. Compl. ¶ 88;  
 8 Mot. at 21. Section 1452 of Title 10 of the California Code of Regulations was promulgated  
 9 pursuant to Financial Code section 22150, and provides:

10 When making or negotiating loans, a finance company shall take into consideration,  
 11 in determining the size and duration thereof, the financial ability of the borrowers to  
 12 repay the same, to the end that the borrowers should be reasonably able to repay said  
 13 loans in the time and manner provided in the loan contracts.

13 Cal. Code Regs. tit. 10, § 1452.

14 Plaintiffs argue that common issues predominate this claim because the claim "examines  
 15 CashCall's common conduct in making loans without attention to whether the consumer could or  
 16 could not repay the loan." Mot. at 21. They contend that "[p]roof of this claim will thus be a  
 17 centralized inquiry into CashCall's process (or lack thereof) for evaluating a borrower's ability to  
 18 repay his/her loan prior to its funding." *Id.* In particular, Plaintiffs intend to proffer evidence  
 19 concerning CashCall's business model and its underwriting process, which Plaintiffs characterize as  
 20 "inadequate." *Id.* at 21-22. CashCall responds that its "entire underwriting process involves an  
 21 individual evaluation of each prospective borrower's financial condition," and proffers testimony  
 22 from Thomas Morgan describing its procedures. Opp'n at 24. CashCall further argues that  
 23 Plaintiffs' own testimony undermines their theory, as all three Plaintiffs testified that they could  
 24 initially afford their monthly payments and intended to pay off their loans early. *Id.* (citing Seiling  
 25 Decl., Exs. H at 39:5-21, 230:11-17; Ex. I at 144:17-145:16; Ex. J at 86:14-17, Dkt. No. 84).  
 26 Additionally, CashCall proffers evidence that 33% of all borrowers paid off their loans early. Opp'n  
 27 at 25 (citing Ethan Post Decl. ¶ 12, Dkt. No. 77).

On its face, Plaintiffs' argument that the Court would only need to examine, generally, whether CashCall has some procedure in place to assess a borrower's ability to repay the loan has some traction. However, in order to resolve whether CashCall violated section 1452, the Court will need to examine how CashCall's loan application and underwriting process actually operated to vet individual borrowers. Specifically, CashCall has identified evidence that both its automated and manual underwriting process screens potential borrowers for creditworthiness, and routinely reject a significant percentage of applicants because they do not meet its underwriting criteria. Opp'n at 24 (citing Thomas Morgan Decl. ¶¶ 5-23, Dkt. No. 81). The question then becomes whether these procedures are sufficient to satisfy CashCall's obligation under section 1452. If, as Plaintiffs contend, the procedures provided no meaningful review of the borrower's ability, Plaintiffs may have a meritorious claim. On the other hand, if the procedures were sufficient in analyzing a borrower's financial status and ability to successfully repay the loan, CashCall may prevail. Either way, the generalized inquiry Plaintiffs propose will ultimately lead to a more particularized examination of CashCall's underwriting process vis-a-vis individual borrowers to determine whether CashCall engaged in any meaningful consideration of their ability to repay the loans in the time and manner specified in the loan agreement. As a result, the Court finds that common questions do not predominate this claim and it is unsuitable for class treatment.

*ii. The "Unfair" Prong*

Plaintiffs allege that "CashCall's business practices in offering loans with grossly one-sided terms (including the charging of excessively high interest rates, requiring payment of 4-6 times the original loan amounts, the extended loan maturities, charging of unfair and excessive fees designed to extend the length of repayment) are unfair," and give rise to a claim under the unfair prong of the UCL. Mot. at 22. According to Plaintiffs, "[t]he common issues under the UCL unfair prong are CashCall's practices in making 90+% interest loans on a take-it-or-leave-it basis that cost multiple times the amount of the loan and take years to repay." *Id.* at 23. They further assert "CashCall's practices of offering loans at exceptionally high interest rates of nearly 100% (and higher), the length of repayment of the loan, the structure of the payments (*e.g.*, interest only for nearly two

1 years) are all common acts of CashCall that do not require an individual inquiry into the class  
2 members' circumstances." *Id.* Additionally, they submit that "[t]he terms of the loan are all non  
3 negotiable and offered on a take-it-or-leave-it basis by CashCall." *Id.* CashCall fails to present any  
4 argument in response in its Opposition.

5 Looking at this claim, California appellate courts disagree on how to define an "unfair" act  
6 or practice in the context of a UCL consumer action. *See Rubio v. Capital One Bank*, 613 F.3d  
7 1195, 1204-05 (9th Cir. 2010); *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 735-36 (9th Cir.  
8 2007). One test California courts have applied "requires that the public policy which is a predicate  
9 to a consumer unfair competition action under the 'unfair' prong of the UCL must be tethered to  
10 specific constitutional, statutory, or regulatory provisions." *Drum v. San Fernando Valley Bar*  
11 *Ass'n*, 182 Cal. App. 4th 247, 256 (2010) (internal quotations omitted) (citing *Bardin v.*  
12 *Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255, 1260-61 (2006)). A second test formulated by the  
13 California courts examines "whether the alleged business practice 'is immoral, unethical,  
14 oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the  
15 utility of the defendant's conduct against the gravity of the harm to the alleged victim.'" *Id.*  
16 (quoting *Bardin*, 136 Cal. App. 4th at 1260).

17 Plaintiffs argue that the claim is suitable for certification under either test because the focus  
18 is CashCall's practices of charging interest rates above 90% and the structure and length of  
19 repayment – all of which are sufficiently uniform and do not require individual assessments of each  
20 class member. Mot. at 23. The Court, however, disagrees. To determine whether the terms of  
21 CashCall's loan agreements are "immoral, unethical, oppressive, unscrupulous or substantially  
22 injurious to consumers" under the UCL, the Court must examine the utility of CashCall's practices  
23 in including each provision and the affect on borrowers. Thus, the circumstances surrounding each  
24 loan agreement, including each borrower's financial circumstances, would come into play, requiring  
25 individualized examinations. The Court therefore finds that this claim is inappropriate for class  
26 treatment.

1           2.       Whether the Class Action Device is Superior

2           The final factor the Court must consider under Rule 23(b)(3) is whether “a class action is  
3 superior to other available methods for fairly and efficiently adjudicating the controversy.” Because  
4 the Court has found that only Plaintiffs’ EFTA claim and their UCL claim under the unlawful prong  
5 based on the EFTA violations and on violations of California Financial Code section 22302 and Civil  
6 Code section 1670.5 meet the foregoing requirements for class action treatment, the Court’s analysis  
7 is focused on whether class action is superior as to those claims.

8           In support, Plaintiffs first argue that “the stake of an individual Class member is insufficient  
9 to support individual litigation.” Mot. at 24. Particularly, they assert that “the monetary recovery  
10 for an individual Class member is small relative to the cost and burden of individual pursuit of the  
11 claims,” and that “[d]evelopment of the evidence and legal issues, discovery, and expert witness  
12 requirements combine to pose costs and risks that are prohibitive for an attorney and client in the  
13 non-class setting.” *Id.*

14           CashCall, however, argues that the proposed Class is not manageable. Opp’n at 4. It  
15 contends that “Plaintiffs’ unwieldy class definition . . . creates insurmountable case management  
16 challenges,” and charges that Plaintiffs have not even attempted to explain how the Court could sort  
17 out these issues or resolve their claims in a single trial. *Id.*

18           With respect to the class members’ interests in individually controlling the prosecution of  
19 separate actions, the Court agrees with Plaintiffs that the relatively small amount of damages that  
20 may be recovered from the EFTA and related UCL claims as compared to the costs of litigating an  
21 individual suit weighs in favor of class treatment of the claims.

22           As to the extent and nature of any litigation concerning CashCall’s practices already begun  
23 by class members, the parties have not identified any similar class actions involving the same claims  
24 or putative class or any individual actions that are currently pending.

25           With respect to the desirability or undesirability of concentrating litigation of the claims in  
26 the particular forum, because CashCall is a California corporation and has made loans to consumers  
27 throughout the state of California, the Northern District is both a convenient and appropriate forum  
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1 for litigating this case.

2 Finally, the Court must assess the likely difficulties in managing a class action. CashCall  
3 argues that a class action would not be manageable for several reasons. First, it argues that  
4 Plaintiffs' class definition is vague and because Plaintiffs' claims involve distinct factual and legal  
5 issues, creating subclasses would splinter the case into a myriad of predominant individual issues.  
6 Opp'n at 5. Next, CashCall argues that because more than 175,961 putative class members are  
7 currently in default, it would need to file compulsory counterclaims or seek offsets, creating  
8 additional manageability problems. *Id.* Third, CashCall argues that Plaintiffs' requested remedy of  
9 rescission of the loans "is an inherently individual remedy that is ill-suited for class adjudication."  
10 *Id.*

11 The Court, however, is unpersuaded by CashCall's concerns. As set forth in this Order, only  
12 two of Plaintiffs' claims are appropriate for class treatment. Thus, this significantly limits the  
13 factual and legal issues in play and makes for a more refined putative class. As to these claims,  
14 because they rely on documentary evidence, namely loan agreements, the putative class members  
15 who executed the agreements are ascertainable. As to the remedies Plaintiffs seek on behalf of the  
16 putative class, the Court does not see any issues determining which class members would be entitled  
17 to damages or other relief if they prevail on their claims. Accordingly, the Court finds that class  
18 action is superior to individual litigation of Plaintiffs' claims and, as to those claims, there are no  
19 obvious manageability problems.

#### 20 IV. CONCLUSION

21 In sum, the Court finds that Plaintiffs have met their burden of demonstrating that the  
22 following claims are suitable for class treatment under Rule 23(a) and (b)(3): (1) the claim for  
23 violation of the EFTA based on CashCall's cancellation policy in its pre-February 2007 Promissory  
24 Notes; (2) the claim for violation of the EFTA based on CashCall's alleged conditioning of loans on  
25 a borrower's consent to EFT payments; (3) the UCL claim premised on the EFTA violations; and (4)  
26 the UCL claim based on violation of California Financial Code section 22303 and Civil Code  
27 section 1670.5. The Court therefore **GRANTS** Plaintiffs' Motion as to these claims and certifies the  
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1 following National Class under Rule 23(b)(3):

2 All individuals who borrowed money from CashCall, Inc., between June 30, 2004  
3 and February 2007, who signed CashCall's promissory note containing an electronic  
4 funds authorization indicating that cancellations of such authorization must be  
5 received at least seven days prior to the applicable payment due date.

6 The Court also certifies the following California Class:

7 All individuals who, while residing in California, borrowed from \$2,500 to \$2,600 at  
8 an interest rate of 90% or higher from CashCall, Inc., for personal, family, or  
9 household use at any time from June 30, 2004, to the present.

10 The Motion is **DENIED** in all other respects.

11 The Court retains the inherent power to review class certification decisions at any time. Fed.  
12 R. Civ. Pro. 23(c)(1)(C); *Officers For Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir.  
13 1982). Should future circumstances demonstrate that individual issues in this case either  
14 predominate or render the case less manageable than anticipated, the Court can revisit its  
15 certification decision at that time.

16 IT IS FURTHER ORDERED that this matter is set for a case management conference on  
17 January 19, 2012 at 10:00 a.m. At the conference the Court will discuss issues not addressed by the  
18 parties in the certification motion, including appointment of class counsel pursuant to Rule 23(g) and  
19 a briefing schedule for Plaintiffs' motion for class notice. The parties shall file a joint case  
20 management statement no later than January 5, 2012 outlining any other issues that will need to be  
21 addressed at the conference. After the hearing, the Court will issue a supplemental class  
22 certification order resolving these issues.

23 **IT IS SO ORDERED.**

24 Dated: November 14, 2011

25   
26 Maria-Elen James  
27 Chief United States Magistrate Judge  
28